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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN G. PERLMAN, REARDEN LLC, and ARTEMIS NETWORKS, LLC,	
Appellants,	C.A. No. 305, 2020
v.	Courts Below:
VOX MEDIA, INC., a Delaware corporation,	Superior Court of the State of Delaware, New Castle County, C.A. No. N19C-07-235 PRW-CCLD
Appellee.	Court of Chancery of the State of Delaware, C.A. No. 10046-VCS

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

Vox's[1] Answering Brief attempts to distract and confuse the straightforward and limited issues that are on appeal. Indeed, the bulk of Vox's brief asks this Court to engage in a fact-finding exercise, arguing the Court should find for the first time that Plaintiffs' claims are barred by the equitable doctrine of laches. Vox, along with the Reporters Committee and forty Media Organizations identified as proposed *amici curiae* (together, the "Amici Curiae"), also go to great lengths to extol the virtues of the single-publication rule and the value of hyperlinks to online journalism. However, that is not what this appeal is about.

This appeal is about Vox's ongoing effort to avoid any adjudication of the merits of Plaintiffs' claims. Vox argues that the claims related to the 2012 Articles are time-barred. They are not, for a simple reason. Through its 2014 Article, Vox updated the 2012 Articles and thereby republished those articles, resetting the one-year statute of limitations. Vox argues the republication concept of updating or altering prior defamatory material requires a publisher to go back and alter or update the original text, but that is not the law. The law simply requires an update to or alteration of the defamatory material.

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[1] Any capitalized terms not defined herein have the same meanings as given in Appellants' Corrected Opening Brief (the "Opening Brief").

Here, the defamatory August 28 Article offered an unsourced and untrue story about how Perlman supposedly mismanaged one of his start-ups, OnLive, Inc., leading to the ABC. Despite this alleged mismanagement, the August 28 Article noted that the new owner would continue the business "as if nothing happened" following the ABC. A1158. In the first line of the 2014 Article, Vox updated this story with the false Defunct Statement: "Steve Perlman, the creator of **the defunct game-streaming service OnLive**," with the bolded words (orange in the article) directing readers to the August 28 Article via hyperlink. A1278. That was clearly an update regarding the prior defamatory story: any reader who read the Defunct Statement, clicked on the hyperlink, and then read the August 28 Article did so through the lens of having been told that the OnLive game-streaming service is now defunct. Moreover, this update was intentional. Vox purposefully linked to the sensational 2012 Article because it admittedly wanted readers of the 2014 Article—which was about Perlman and Artemis's pCell technology—to know about Perlman's last alleged failed venture and technology, and that Artemis's pCell may well suffer the same fate.

Despite what Vox and the Amici Curiae repeatedly say, the Defunct Statement was not a "mere hyperlink." Of course, Vox and the Amici Curiae would love to eliminate the concept of republication altogether, and one effective way to accomplish that shared commercial and economic objective is to have this Court rule

that hyperlinks, regardless of what they say or their substance, can never constitute a republication. The Court should decline the invitation.

The Court should also reverse the Superior Court's determination that the clearly false Defunct Statement was not about Plaintiffs and was not defamatory. The standard is clear here: the statement cannot be declared non-defamatory as a matter of law if an average reader would find it to "reasonably bear the defamatory meaning." That standard is easily met, as Vox concedes the statement must be read in context and given its plain meaning. The Court of Chancery already found the statement could reasonably bear the defamatory meaning. The Superior Court reached the opposite conclusion, but only by reading the statement out of context and ignoring its plain meaning.

Finally, for the reasons addressed in Plaintiffs' briefs, the Court should reverse the ruling of the Court of Chancery that it lacked subject matter jurisdiction over Plaintiffs' claims.

ARGUMENT

I. THE COURT OF CHANCERY HAS JURISDICTION OVER PLAINTIFFS' CLAIMS BECAUSE A LEGAL REMEDY IS INADEQUATE.

There is no dispute that the Court of Chancery's equitable jurisdiction is properly invoked when there is no adequate remedy at law. *See* 10 *Del. C.* §§ 341, 342; *DuPont v. DuPont*, 85 A.2d 724, 727 (Del. 1951). Nonetheless, Vox asks this Court to affirm a judicially created, categorical exception to this rule for defamation claims, even where a plaintiff seeks necessary equitable redress.[2] This request is unfounded, unsupported, and must be denied.

First, Vox misconstrues the relevant inquiry. After correctly noting that, when assessing jurisdiction based on a request for equitable relief, the Court of Chancery "'take[s] a practical view of the complaint'" and "goes behind the 'facade of prayers' to determined 'the true nature of the claim,'"[3] Vox argues that "[t]he 'true nature' of Plaintiffs' claim here is defamation, a tort that sounds in law…." Ans. Br. at 11 (citation omitted); *see also id.* at 13 ("Defamation is a legal cause of action, and courts have long held that . . . money damages are an adequate remedy.") (citations omitted). But whether the *claim* is equitable or legal in nature is irrelevant.

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[2] Except in cases of trade libel and adjudicated falsehoods, which were carved out from the Court's analysis in *Organovo*.

[3] Ans. Br. at 11 (quoting *IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 (Del. Ch. 1991) and *Christiana Town Ctr., LLC v. New Castle Cnty.*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003), *aff'd*, 841 A.2d 307 (Del. 2004)).

See, e.g., *Medek v. Medek*, 2008 WL 4261017 (Del. Ch. Sept. 10, 2008) (holding Court of Chancery had jurisdiction over legal fraudulent transfer claim because plaintiff lacked full remedy at law). The focus of the Court's analysis is whether there is a valid prayer for an equitable remedy that a law court lacks jurisdiction to bestow. *See Hillsboro Energy, LLC v. Secure Energy, Inc.*, 2008 WL 4561227 (Del. Ch. Oct. 3, 2008). Here, the Complaint validly invoked the Court of Chancery's jurisdiction because, absent an order requiring Vox to remove the Articles, Plaintiffs will continue to be harmed, rendering money damages inadequate. *See* Open. Br. at 20–21.

Vox then argues, without support, that the continued availability of the Articles does not render money damages inadequate because, should Plaintiffs succeed on their claim, the length of time during which the Articles were available may be factored into the damages analysis. Ans. Br. at 13–14. This argument ignores the crux of Plaintiffs' request for equitable relief—that regardless of the award of money damages for the harm *already* caused by the Articles, only an equitable decree requiring Vox to remove the Articles will address the ongoing, offending act that is causing Plaintiffs continued harm.[4] Because they will not afford

[4] Vox argues, without support, that Plaintiffs' claim that the Articles are causing ongoing harm is a pretext to avoid the statute of limitations applicable in the Superior Court. *See* Ans. Br. at 16. This is demonstrably false. In both the Court of Chancery and Superior Court, Plaintiffs argued (and continue to argue here), that the claims related to the 2012 Articles are not time barred—either by laches or the applicable

Plaintiffs the full, fair, and practical relief necessary to rectify the ongoing harm to Plaintiffs caused by the Articles, money damages are inadequate. Thus, the Court of Chancery has jurisdiction over Plaintiffs' claims. *See* Open. Brief 20–21.

The ability of Plaintiffs to seek the necessary equitable relief after an adjudication of wrongdoing in the Superior Court does not change this analysis, which must be based on the face of the complaint at the time of filing, with all material factual allegations presumed as true. *See Int'l Bus. Machs. Corp. v. Comdisco, Inc.,* 602 A.2d 74, 78 (Del. Ch. 1991); *Diebold Computer Leasing, Inc. v. Com. Credit Corp.,* 267 A.2d 586 (Del. 1970). Indeed, ruling the Court of Chancery lacks jurisdiction where a plaintiff is able to petition the Court of Chancery for the necessary equitable relief after a merits determination in Superior Court would render illusory the Court's equitable jurisdiction based on a cognizable prayer for equitable relief in nearly all such cases.

There is no principled reason for the Court to treat defamation claims differently in this regard and create a judicial exception to 10 *Del. C.* §§ 341, 342.[5] Plaintiffs are unaware of any other instances where the Court of Chancery's

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statute of limitation—because the 2014 Article republished the 2012 Articles, resetting the relevant timeline.

[5] As explained in Plaintiffs' Opening Brief (at 22–24), Vox's reliance on the *Organovo* decision is misguided, as is Vox's reliance on the subsequent Court of Chancery cases that follow *Organovo*. *See* Ans. Br. at 12 n.3. The *Organovo* decision is not binding on this Court.

equitable jurisdiction has been so proscribed by judicial fiat and respectfully submit that this Court should not endorse such a rule here. The Court of Chancery's ruling should therefore be reversed.

II. WHETHER PLAINTIFFS' 2012 CLAIMS ARE BARRED BY LACHES SHOULD BE DECIDED BY THE COURT OF CHANCERY.

In its Answering Brief, Vox argues that, should this Court find that the Court of Chancery has jurisdiction over Plaintiffs' claims, the Court should preemptively conclude that the claims related to the 2012 Articles are barred by laches. *See* Ans. Br. at 17–25. Vox's request is procedurally improper, and this Court should reject Vox's invitation to usurp the role of the trial court in assessing Vox's laches defense in the first instance. Even if not procedurally improper, Vox's request is not supported by the facts. Moreover, any such ruling is unnecessary, as Vox republished the 2012 Articles, rendering Plaintiffs' claims related thereto timely.

Whether Plaintiffs' claims are barred by laches is a factual question. *See, e.g.*, *Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 9 (Del. 2009) ("Knowledge and unreasonable delay are essential elements of the defense of laches. The precise time that may elapse between the act complained of as wrongful and the bringing of suit to prevent or correct the wrong does not, in itself, determine the question of laches. What constitutes unreasonable delay is a question of fact dependent largely upon the particular circumstances.") (quoting *Fed. United Corp. v. Havender*, 11 A.2d 331, 343 (Del. 1940)). This factual question has not been addressed by the trial court. Indeed, the only decision touching on the matter is the Court of Chancery's decision denying Vox's motion to dismiss. There, at the pleading stage, the Court concluded that Vox had not carried its burden of establishing both prejudice and that Plaintiffs

could prove no set of facts to avoid the affirmative defense. A224–25. When later presented with Vox's motion for summary judgment on the same issue, the Court of Chancery did not address it, instead deciding the motion solely on the basis of subject matter jurisdiction. *See* Ex. A.

Because the trial court has made no factual findings on the matter, this Court should not do so now, without the benefit of the trial court's analysis and reasoning. *See, e.g.*, *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 894 (Del. 2015) ("We are reluctant to rule on this issue in the first instance because the question . . . is a complicated factual determination, and we do not have sufficient analysis from the Superior Court to guide us."); *C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1054 (Del. 2014); *see also Lank v. Steiner*, 224 A.2d 242, 245 (Del. 1966) (noting Supreme Court's deference to factual findings of trial court and that "[j]udicial restraint leads us to exercise our power to make our own findings of fact sparingly and only" where "the doing of justice requires it"). In line with this historical and well-reasoned preference for the trial court to make factual findings in the first instance, should the Court find that the Court of Chancery has subject matter jurisdiction over Plaintiffs' claims, the matter should be remanded to allow the Court

of Chancery to consider and resolve Vox's laches defense if that resolution ever proves to be necessary.[6]

[6] If the Court does opt to rule on the laches issue, Plaintiffs rely on and incorporate herein their Answering Brief in Opposition to Defendant's Motion for Summary Judgment, dated Nov. 30, 2018 (A497–573), which sets forth why Vox is not entitled to summary judgment on its laches defense.

III. THE 2014 ARTICLE REPUBLISHED THE 2012 ARTICLES.

Vox asks this Court to affirm the Superior Court's holding that the 2014 Article did not republish the 2012 Articles while shunning the Superior Court's reasoning in support of that holding. Indeed, nowhere in the Answering Brief does Vox embrace, or even acknowledge, the Superior Court's flawed view that the 2014 Article did not republish the 2012 Articles because the Defunct Statement itself is not defamatory, a ruling that misapplies the relevant law, and is factually wrong, for the reasons set forth in Plaintiffs' Opening Brief. *See* Open. Br. at 27–32, 39–43. By eschewing the Superior Court's reasoning for its republication holding, Vox tacitly acknowledges the lower court's legal error, which must be reversed.[7]

Vox argues nonetheless that the Superior Court's ruling should be affirmed, intentionally misconstruing the nature of Plaintiffs' republication argument. Indeed, Vox goes to great lengths to frame Plaintiffs' argument as one that automatically equates a hyperlink with republication. *See* Ans. Br. at 26–28. The Amici Curiae echo this argument in their brief. *See* Amicus Br. at 10–18. But this is not, and has never been, Plaintiffs' argument. Rather, Plaintiffs' position is, consistent with California law and Vice Chancellor Parsons's analysis and ruling, that a hyperlink constitutes republication of a prior article when the words of the hyperlink in the

[7] The Amici Curiae also do not acknowledge or embrace the Superior Court's erroneous republication analysis in their amicus brief.

subsequent article substantively add to or update the defamatory content of the article it references.[8] This analysis rests on well-established republication law in California and is not, as Vox suggests, a new rule. *See* Open. Br. at 25–32. Indeed, it is Vox—with the help of the Amici Curiae—who would have this Court adopt a new rule that a hyperlink can never republish prior defamatory content. *See* Ans. Br. at 29–31. This rule is unsupported and was not even adopted by the Superior Court below.

Here, the Defunct Statement clearly updated and added to the prior defamation found in the 2012 Articles. While the 2012 Articles discuss OnLive and Perlman in depth, and falsely blame Perlman for grossly mismanaging OnLive, Inc., they do not refer to the OnLive game-streaming service, created by Perlman, as "defunct." Rather, the August 28 Article states that the company intended to "continue the business as if nothing happened" following the ABC. A1158. As such, someone reading the Defunct Statement in the first line of the 2014 Article—"Steve Perlman, the creator of **the defunct game-streaming service OnLive**"—and then clicking on

[8] While Vox feigns ignorance of and criticizes Plaintiffs for emphasizing the "substantive" nature of the updates at issue here, this is consistent with California law on republication, which distinguishes "substantive" and "merely technical" modifications to prior defamatory material. *See Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012) (citation omitted); *Oja v. U.S. Army Corps of Engineers*, 440 F.3d 1122, 1132 & n.14 (9th Cir. 2006) ("Of course, ***substantive*** changes or updates to previously hosted content that are not 'merely technical' may sufficiently modify the content such that it is properly considered a new publication….") (emphasis added and citation omitted).

the orange and bold hyperlink to read the August 28 Article, which states the game-streaming service OnLive is *not* defunct, would necessarily read the prior defamatory article and comments thereto through the lens of the update provided by the Defunct Statement. A1278. By any logical standard, the Defunct Statement in the 2014 Article thereby updated and added to the prior defamation, constituting a republication.[9]

Vox and the Amici Curiae seek to avoid this conclusion by arguing that this kind of update can never constitute a republication because it is delivered in the form of a hyperlink and does not change the actual text of the 2012 Articles. Under this standard, an "update" inserted on the pages for the 2012 Articles to note that the OnLive game-streaming service was now defunct would satisfy the republication exception to the single-publication rule. But, because Vox conveyed this update on a different page of its website—while intentionally directing readers back to the August 28 Article—Vox and the Amici Curiae contend that is not a republication.

The republication exception applies when a later statement updates or alters prior defamatory material; the law does not require the original defamatory text itself be updated or altered. And, in the context of online media, where publishers choose to use substantive hyperlinks to update earlier publications, that is effectively the

[9] To the extent there is any factual debate about whether the Defunct Statement updated the 2012 Articles, this dispute precludes judgment as a matter of law in Vox's favor on a motion for summary judgment.

same thing as changing or updating the original text. There is an obvious reason Vox and the Media Organizations[10] behind the Amici Curiae seek to have this Court draw this non-sensible distinction between updates to the original text and updates via hyperlinks: it would effectively provide them immunity from liability for perpetuating and updating prior defamation by using words in hyperlinks. Indeed, updating past defamation by simply embedding the updating words in a hyperlink becomes a perfect shield of immunity for refreshing past defamation, much to the economic benefit of Vox and the Amici Curiae. As the world continues its transition from print to online media, this would provide a standard method to dodge liability under republication law for almost all publications.

The cases Vox and the Amici Curiae rely on do not support their sweeping request for immunity, as none of the cases involves a hyperlink that provides an update, as is the case here. For example, *Churchill v. State*, 876 A.2d 311 (N.J. Super. Ct. App. Div. 2005), involved a press release published on a website that invited readers to view prior alleged defamation on the website; the press release did

[10] While these Media Organizations claim to support Vox's arguments now, their publications appeared to distance themselves from Vox's faulty reporting. In 2012, several of the news publications controlled by the Media Organizations did not rely on the 2012 Articles when reporting on OnLive and the ABC and instead fact-checked and utilized credible factual sources for their own articles, reporting a different narrative. Likewise, in February 2014, several of these news publications published stories about the launch of pCell, with some noting correctly that the OnLive game-streaming service created by Steve Perlman was still operating.

not add to or update the original defamation, just redirected viewers to it. Likewise, in *Salyer v. Southern Poverty Law Center, Inc.*, 701 F. Supp. 2d 912 (W.D. Ky. 2009), subsequent hyperlinks and references to an earlier alleged defamatory report on a website did not add any information to the original report or even mention the plaintiff. And in *In re Philadelphia Newspapers, LLC*, 690 F.3d 161 (3d Cir. 2012), when linking to earlier allegedly defamatory statements, the later publication described the general content of the linked article but did not add to or update it.[11]

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[11] *See also Penaherrera v. N.Y. Times Co.*, 2013 WL 4013487, at *6 (N.Y. Sup. Ct. Aug. 8, 2013) (hyperlinks that did not add to or update earlier articles not a republication); *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495 (6th Cir. 2015) (continued availability of news stories online did not constitute republication, nor did the updating of commercial advertisements on the borders of the webpage); *Mirage Ent., Inc. v. FEG Entretenimientos S.A.*, 2018 WL 4103583 (S.D.N.Y. Aug. 29, 2018) (no republication for linking to allegedly defamatory news article on Twitter where Tweet did not add to or update the original story); *Nunes v. Lizza*, -- F. Supp. 3d --, 2002 WL 5504005 (N.D. Iowa Sept. 11, 2020) (no republication for reposting article on Twitter but not adding to or updating the original story); *Penrose Hill, Ltd. v. Mabray*, 2020 WL 4804965, at *8 (N.D. Cal. Aug. 18, 2020) (Tweet that reposted allegedly defamatory blog post was not a republication because "[t]he text of the Tweet does not contain any statements about [plaintiff] or [plaintiff's business] or repeat any of the contents of the Blog Post"); *Giuffre v. Dershowitz*, 410 F. Supp. 3d 564, 570 (S.D.N.Y. 2019) (analyzing whether statements made within statute of limitations were republications of "substantively identical" statements made outside of one-year statute of limitation period); *U.S. ex rel. Klein v. Omeros Corp.*, 897 F. Supp. 2d 1058 (W.D. Wash. 2012) (statement with URL linking to allegedly defamatory statements found in complaint did not add to or update the original statement); *Shepard v. TheHuffingtonPost.com, Inc.*, 2012 WL 5584615 (D. Minn. Nov. 15, 2012), *aff'd*, 509 F. App'x. 556 (8th Cir. 2013) (addressing hyperlinks that did not add to or update the content of the original article); *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, 2007 WL 935703 (S.D. Cal. Mar. 7, 2007) (no republication via hyperlinks to allegedly defamatory statement on website that did not alter or update the original statement); *Martin v. Daily News L.P.*, 990

The United States District Court for the Southern District of New York recognized this important distinction in *Enigma Software Group USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263 (S.D.N.Y. 2016). There, a website operator posted thirteen allegedly defamatory posts over nearly two years. *Id.* at 277. Eight posts were made within one year of the initiation of the action, *i.e.*, on or after January 5, 2015, and therefore were conceded as timely. Each of these eight timely posts included a hyperlink to an allegedly defamatory post published on September 28, 2014. Relying on many of the same cases Vox and the Amici Curiae cite here, the defendant argued that the hyperlinks to the September 2014 post did not create a republication that reset the limitations period and therefore any claim related to the 2014 post was time-barred. *Id.* The court rejected this argument, finding that four of the concededly timely posts included links to the 2014 post and provided additional substantive information related to the prior defamatory material. *Id.* at 278–79. The court distinguished this situation from the facts in *In re Philadelphia Newspapers, LLC* and *Salyer v. Southern Poverty Law Center, Inc.* because

> [t]here, the hyperlinks were either posted without commentary or accompanied by a reference that did not restate the allegedly defamatory content... The cases on which [defendant] relies are therefore inapposite, as they

N.Y.S. 2d 473 (N.Y. App. Div. 2014) (addressing question of whether restoration of substantively identical articles to website after their accidental removal constituted republication).

> do not address whether, *under these circumstances*, … hyperlinking to the 2014 Post amounts to a republication.

Id. at 278 (emphasis added) (citing and discussing *In re Phila. Newspapers, LLC*, 690 F.3d 161 (3d Cir. 2012) and *Salyer v. S. Poverty Law Ctr., Inc.*, 701 F. Supp. 2d 912 (W.D. Ky. 2009)).

The court went on to say that the facts of the case were more analogous to "cases where substantive material [was] added to a website, and that material [was] related to defamatory material that [was] already posted." *Id.* at 278–79 (alterations in original; internal quotation marks and citation omitted). The court drew a comparison to *In re Davis*, discussed in Plaintiffs' Opening Brief, where the court "held that defendants had republished a website containing allegedly defamatory material when they updated it to add 'Breaking News!' and 'Update!' sections which 'list[ed] additional nefarious activities in which [the plaintiffs were] … alleged to have participated.'" *Id.* at 279 (quoting *In re Davis*, 347 B.R. 607, 611–12 (W.D. Ky. 2008) (alterations in original)). The court also analogized the case to *Larue v. Brown*, where "the court held that there was republication when the author of an online article responded to reader comments by re-urging the truth of the article and posting additional substantive information." *Id.* (citing *Larue v. Brown*, 235 Ariz. 440, 446 (Ariz. Ct. App. 2014)). Just like the more recent articles in *Enigma Software Group USA,* the Defunct Statement "go[es] beyond merely hyperlinking"

to the August 28 Article. Vox and the Amici Curiae's invocation of cases that say a "mere hyperlink" is not a republication is therefore unavailing.

Likewise, Vox's arguments that the 2014 Article did not direct the 2012 Articles to a new audience fail. Vox does not meaningfully address the fundamental flaw in the Superior Court's analysis, which incorrectly analyzed whether the 2014 Article caused *The Verge website as a whole* to reach a new audience instead of whether the 2014 Article directed *the 2012 Articles* to a new audience. *See* Open. Br. at 32–37.[12] Instead, Vox again myopically focuses on the medium of the republication (a hyperlink), arguing that "hyperlinking to a prior article is not a publication at all, regardless of whether new readers click on it." Ans. Br. at 32. Vox misses the point of the new audience test entirely, which looks at whether a later publication (the 2014 Article) caused the original defamatory content (the 2012 Articles) to reach a new audience, justifying renewal of the statute of limitations in contravention of the single publication rule. *See Yeager*, 693 F.3d at 1082. When properly focused on this factual inquiry, the record shows that the 2014 Article did republish the 2012 Articles to a new audience. *See* Open. Br. at 36–37. At most,

[12] While the Superior Court briefly considered whether the "website" could be the individual articles, it mistakenly analogized the article to a sequel. Ex. B at 20. Contrary to the Superior Court's statement, if a sequel republishes defamatory material, there is nothing under California law that would prevent it from being considered a republication and the case the Superior Court cites does not even mention sequels. *See id.* (citing *Rinaldi v. Viking Penguin, Inc*., 420 N.E.2d 377, 381 (N.Y. 1981).

Vox's arguments to the contrary only emphasize the factual disputes concerning the new audience analysis that were ignored by the Superior Court, rendering summary judgment on the matter inappropriate.

Moreover, Vox affirmatively and deliberately chose to include the Defunct Statement in the 2014 Article and direct new readers to the prior defamatory statements, which supports a finding of republication. *See* Open. Br. at 26–27; A992. While Vox tries to run away from the implications of this conscious decision (Ans. Br. at 35–36), the main case cited by Vox in its summary judgment briefing and cited again in its Answering Brief, *Clark v. Viacom International Inc.*, expressly endorsed the view that if the circulation of the defamatory material to a new audience was a conscious and deliberate decision, then it is a republication that restarts the statute of limitations. 617 Fed. App'x at 505–06 ("[T]he traditional touchstone of the republication doctrine . . . is if the speaker has affirmatively reiterated it in an attempt to reach a new audience that the statement's prior dissemination did not encompass. After all, a reiterated statement generates new reputational harm only if the statement is repeated with an intent and ability to expand its dissemination beyond its previous limits.") (citations omitted). While Vox's action clearly meets this republication standard, in *Clark*, the defendant did not, because it took no action beyond keeping the statements on its website and passively allowing automatic updating of surrounding advertisements. *Id.* at 506–07.

IV. THE 2014 ARTICLE IS DEFAMATORY TO PLAINTIFFS.

As set forth in Plaintiffs' Opening Brief, to determine whether Plaintiffs' claims concerning the 2014 Article may be presented to a jury, the relevant inquiry is whether an average reader would interpret the article in a way that would render it defamatory. *See* Open. Br. at 39–40. Plaintiffs submit that the Superior Court erred in finding that the 2014 Article could not bear the defamatory meaning alleged by Plaintiffs because it ignored the plain language and meaning of the Defunct Statement. Vox makes the same mistake.

First, Vox argues that the Defunct Statement is not "of or concerning" Plaintiffs because it only refers to the "game-streaming service OnLive" as defunct, and, regardless of how "OnLive" is interpreted, it cannot refer to Plaintiffs. *See* Ans. Br. at 38–40. Vox conveniently ignores that the Defunct Statement directly refers to and implicates Perlman. The title of the 2014 Article is "The man behind OnLive has a plan to fix your terrible cellphone service." A1278. The first line of the article—which includes the Defunct Statement—reads: "Steve Perlman, the creator of the **defunct game-streaming service OnLive**, claims he has the answer to slow wireless service." A1278. The bold text links readers to the August 28 Article. The 2014 Article then goes on to directly compare the now allegedly defunct OnLive game-streaming service with Perlman's new pCell technology: "OnLive, which like pCell seemed impossibly ambitious when it first debuted, delivered on its initial

promise, but failed to turn its ambition into profit." A1280. On its face, and based on its plain meaning, the Defunct Statement ties the "game-streaming service OnLive" to Perlman (as both its creator and the "man behind" OnLive), and then falsely reports that the service created by Perlman is now defunct. A1278–89. When focused on the express subject of the Defunct Statement—the game-streaming service created by Perlman—which was operational and *not* defunct, "'the false portion' of the publication is capable of bearing the defamatory meaning." Ex. B at 11 (citation omitted); *see also* Open. Br. at 40–43.

Next, Vox argues that the Defunct Statement is substantially true because it either refers to (i) OnLive, Inc., which Vox says had ceased operations at the time, or (ii) the OnLive game-streaming service, which Vox argues had a "reduced market presence" by the time the 2014 Article was published. *See* Ans. Br. at 40–44. But, as previously discussed, an average reader would not interpret "the game-streaming service OnLive" as meaning the entire company, OnLive, Inc., which, for example, offered non-game services such as the OnLive Desktop Service, a remote Windows desktop service. *See* Open. Br. at 7, 42. And when correctly focused on the subject of the Defunct Statement—the OnLive game-streaming service—Vox concedes, as it must, that the service was *not defunct*, but operating at what Vox describes as a reduced presence. Ans. Br. at 43. While Vox asks this Court to read the word "defunct" to mean "less popular" or "less robust," an average reader is capable of

understanding the false description of the game-streaming service as "defunct" as a significant smear on Perlman and his companies because it falsely conveyed that they left OnLive customers' personal and financial information exposed and unsecured. Indeed, the Court of Chancery—often called on to act as an "average reader" to interpret documents—acknowledged that such an interpretation of the Defunct Statement was reasonable. A241. So too should this Court.

CONCLUSION

Plaintiffs respectfully request that this Court (i) reverse the Court of Chancery's decision that it lacks subject matter jurisdiction over Plaintiffs' claims, (ii) reverse the Superior Court's decision that the 2014 Article did not republish the 2012 Articles, and (iii) reverse the Superior Court's decision that the 2014 Article is not capable of bearing the defamatory meaning alleged.

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Dated: December 14, 2020
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2020, a copy of the foregoing document was served via *File & Serve*Xpress upon the following attorney of record:

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